89- 1447

NO. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,

v.

CROCKER NATIONAL BANK AND
T. O. S. INDUSTRIES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. If a District Court assumes certain disputed facts adversely to the defendant in order to enter a summary judgment for the defendant, does the action of the Court of Appeals in reversing and remanding for the entry of judgment in favor of the plaintiff, without allowing for further fact-finding on the assumed issues, deprive the defendant of due process of law?

2. If a District Court assumes certain disputed facts adversely to the defendant in order to enter a summary judgment for the defendant, does the action of the Court of Appeals in reversing and remanding for the entry of judgment in favor of the plaintiff, without allowing for further fact-finding on the assumed issues, violate the defendant's right to trial by jury?

3. In reviewing a summary judgment, to what degree can the Court of Appeals examine the evidence to make factual findings that were not addressed by the District Court rather than remand the case further for proceedings in the District Court?

4. Can a Court of Appeals make factual findings that are contrary to the judicial admissions of the plaintiff in order to reverse a summary judgment in favor of the defendant granted by the trial court and remand the case for the entry of judgment in favor of the plaintiff?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Ideco Division of Dresser Industries, Inc. ("Ideco")[1] files this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and asks this Court to vacate the judgment and enter judgment for the Petitioner or, alternatively, to remand the case to the trial court for further proceedings.

1. Pursuant to Sup. Ct. R. 28.1, a listing of the non-wholly owned subsidiaries and affiliates of Dresser Industries, Inc. is included in Appendix J.

OPINIONS BELOW

The decisions of the Court of Appeals are reported at 889 F.2d 1432 (App. A) and 839 F.2d 1104 (App. C). The decisions of the district court are reported at 702 F.Supp. 615 (App. B) and 660 F.Supp. 186 (App. D).

JURISDICTION

The United States Court of Appeals entered an order on November 29, 1989, reversing the decision of the trial court and remanding for the entry of judgment (App. E). A timely motion for rehearing was filed by Ideco and overruled on January 11, 1990 (App. F). This Court's jurisdiction is invoked under 28 U.S.C. § 1241(1). Jurisdiction in the District Court was based on 28 U.S.C. § 1332(a).

STATUTES INVOLVED

This petition involves the fifth and seventh amendments to the United States Constitution and Fed. R. Civ. P. 56(c). Copies are reproduced in Appendix I.

STATEMENT OF THE CASE

Respondent Crocker National Bank ("Crocker") filed this action alleging that Ideco converted certain collateral owned by T.O.S. Industries, Inc. ("TOS") in which Crocker claimed a security interest. The Original Complaint filed by Crocker, in which TOS intervened, identified six drilling rigs and related component parts, including 18 engine packages (App. G). Following discovery, the District Court granted Ideco's motion for summary judgment (App. D). The trial court held that

(1) Ideco retained a security interest in the rigs that was perfected by Ideco's possession of the rigs and that was superior to Crocker's security interest in the after acquired inventory of TOS, and (2) Ideco's recovery of the engine packages from a third party who was the bailee of TOS was proper under § 2.703 of the Uniform Commercial Code ("U.C.C."). In making its ruling, the court assumed there was a contract for the sale of the rigs and engines between Ideco and TOS and that the rigs and engines constituted inventory of TOS.

On appeal from that decision, the Fifth Circuit affirmed the judgment on the rigs holding that, since the rigs were never delivered, TOS did not have sufficient rights in the rigs for the Crocker security interest to attach, and agreeing that Ideco had a perfected possessory purchase money security interest in the rigs superior to any security interest claimed by Crocker (App. C). As to the engines, the Court remanded because of a lack of evidence as to the relationship between TOS and Continental Drilling Company ("Continental"), a third party to whom the engines were apparently delivered.

On remand, upon leave of court, Crocker filed an amended complaint. Crocker abandoned its claims with regard to the original rigs and engines and asserted instead that Ideco had converted thirteen completely different engines (App. H). A comparison of the serial numbers and the invoices described in the original and amended complaint establish that the thirteen engines described in the amended complaint are not the same engines that were the subject of the original complaint and first appeal. The amended complaint alleged that TOS sold the thirteen engines to Continental.

The parties then filed cross-motions for summary judgment. After a hearing, the trial court again granted Ideco's motion for summary judgment on three separate grounds, including that the engines were never in the possession of TOS because the engines were delivered to Continental pursuant to the sale to Continental (App. B). Crocker's motion for summary judgment admitted such a sale and incorporated the invoices from TOS to Continental. No proof that Ideco had retaken possession of the thirteen engines was offered in support of Crocker's motion. That proof would have been necessary to establish a conversion of the engines by Ideco.

Crocker filed a second appeal, and this time the Fifth Circuit reversed and remanded in favor of Crocker (App. A). It is clear that the Fifth Circuit did not distinguish between the thirteen engines that were the subject of the second appeal and the eighteen engines that were the subject of the first appeal. The reversal was based upon "a different view of the transaction than . . . the district court." 889 F.2d at 1453. Despite the judicial admissions and uncontroverted evidence, the Fifth Circuit concluded that there had been no sale of the engines from TOS to Continental. This decision was based upon an unfounded factual determination that TOS was the party that returned the engines to Ideco. The only evidence in the record was that the eighteen engines, those that were not before the court, had been returned to Ideco by Continental. There was no evidence that the thirteen engines had been returned to Ideco by any party. The Fifth Circuit entered judgment reversing the trial court's judgment and remanding the case for further proceedings consistent with its opinion (App. E).

In its opinion, the Fifth Circuit supplemented the trial court as the finder of fact. It ignored uncontroverted evidence and judicial admissions by Crocker to find certain facts adverse to Ideco. The Fifth Circuit also took as true certain facts that had been assumed adversely by the District Court to Ideco to support its judgment without any examination of the evidence relating to those facts. By engaging in such a broad factual review of the case, the Fifth Circuit greatly exceeded the scope of review available to a court of appeals reviewing a grant of summary judgment. The decision of the Fifth Circuit also denied Ideco its right to trial by jury under the Seventh Amendment to the United States Constitution and the right to due process under the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986), this Court emphasized the importance of summary judgment proceedings in the federal system:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole. . . .

Fed. R. Civ. P. 56 is to be construed not only with regard to the rights of persons seeking a summary judgment, but also for those parties opposing claims and defenses. *Id.* The standard embodied in Rule 56, that summary judgment can be granted only when there is "no genuine issue as to any material fact," means that a summary judgment is proper only when the record taken as a whole could

not lead a rational trier of fact to find for the non-moving party. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L.Ed.2d 538, 106 S. Ct. 1348 (1986).

In its haste to dispose of this old case, the Fifth Circuit ignored the proper standard of review from a grant of summary judgment. A reviewing court cannot resolve issues of fact or resolve credibility disputes, but may only determine whether the moving party has established its case as a matter of law. *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930 (11th Cir. 1987); *Donahue v. Windor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1987); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540 (9th Cir. 1975). And even though the parties filed cross-motions, summary judgment is not proper for either party unless that party satisfies the requirements of Rule 56. *Prineville Sawmill Co., Inc. v. United States*, 859 F.2d 905, 911 (Fed. Cir. 1988); *Houghton v. Foremost Financial Services Corp.*, 724 F.2d 112, 114 (10th Cir. 1983); *Schwabenbauer v. Board of Education*, 667 F.2d 305, 313-14 (2nd Cir. 1981).

The most glaring example of fact-finding by the Court of Appeals related to the question of whether there was a sale of the engines from TOS to Continental. Ideco has always denied the formation of a contract for the sale of the engines from Ideco to TOS. Without such a sale TOS would not have had sufficient rights in the collateral to allow Crocker's security interest to attach to the goods. *See*, U.C.C. § 9.204. In granting Ideco's motions, the District Court assumed all disputed or potentially disputed facts in favor of Crocker and *assumed* that a sale to TOS had occurred, but found Ideco's security interest

to be superior to Crocker. In its amended complaint, TOS claimed not only that it had purchased the engines from Ideco, but that it resold them to Continental. The resale was crucial because that terminated Crocker's security interest under U.C.C. §§ 9.306 and 9.307.

Despite all of this, the Court of Appeals found that no sale from TOS to Continental had ocurred. This factual determination was clearly erroneous for three reasons. First, it was contrary to the judicial admission of Crocker that such a sale had occurred.[2]

Second, it was based on a subsidiary factual determination that TOS had returned the engines to Ideco. This finding was clearly wrong because the only evidence on this point was an affidavit from Ideco stating that it was Continental that had relinquished possession of the eighteen engines, there was no evidence that Ideco ever regained possession of the thirteen engines.

Third, the Crocker motion incorporated both the Ideco invoices to TOS and the TOS invoices to Continental relating to the thirteen engines. The two sets of invoices were the only evidence of either transaction, and Ideco consistently denied that any sale to TOS had occurred, while TOS only blatantly denied completion of its sale to Continental. The two sets contained identical delivery terms and payment terms. The Ideco invoices sent to TOS were attached to and incorporated in the invoices TOS sent to Continental. There was only one delivery of the

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2. Crocker's summary judgment states "TOS sold and invoiced the Caterpillar Engines in place to Continental pursuant . . ." The affidavit of Richard Ramirez, a TOS officer, in support of the motion repeatedly referred to Continental as "TOS's [sic] customer and subpurchaser of the same . . . Caterpillar Engines. . . ."

engines, and that was to the address specified in the TOS invoices to Continental. The Fifth Circuit accepted, without question, the District Court's asumption that a sale from Ideco to TOS had occurred, but still made a factual finding that no sale from TOS to Continental had occurred. This inconsistent result is logically impossible: either two sales occurred or no sales occurred. Given the identical evidence on the two transactions, the Court of Appeals could not assume the first sale and find as a matter of fact that the second sale had not occurred.

The Court's lapse concerning the existence of the sale creates two problems. First, a Court of Appeals cannot, consistently with Rule 56, assume any facts adversely to a party before rendering a judgment against a party. Second, the assumption that an Ideco-TOS sale had been made by the District Court in connection with the eighteen engines described in the original complaint, but no such assumption was ever made about the thirteen engines set forth in the amended complaint. The Court of Appeals made no effort to review the evidence on the issue of the Ideco-TOS transaction, which was a fact Crocker had to establish to show that TOS had rights in the collateral to which Crocker's security interest could attach.

The existence of a sale was not the only fact assumed by the Court of Appeals. Ideco always contested the factual issue of whether Crocker's security interest in inventory extended to items like the engines. The District Court assumed that issue adversely to Ideco in connection with the original eighteen engines. Neither the District Court nor the Court of Appeals gave any consideration to whether the thirteen engines were part of TOS's inventory, and the delivery to the F.O.B. address on the

TOS invoices to Continental strongly suggests that the engines were never in the possession of TOS even if the engines would have constituted inventory subject to Crocker's security interest. The District Court did not need to reach this issue in entering the judgment in favor of Ideco, but the Court of Appeals assumed the applicability of the security interest.

The Court of Appeals undertook independent fact-finding in at least one other instance when it "found" that the thirteen rigs had been returned to Ideco by TOS. There is no evidence from any party that those engines were ever returned to Ideco. The Fifth Circuit's finding on this point is unfounded and a further usurpation of the province of the finder of fact.

A Court of Appeals should not dispose of a lawsuit by making determinations of contested facts when reviewing a summary judgment. That is precisely what the Fifth Circuit did in this case when it assumed disputed facts adversely to Ideco and made findings of other facts adversely to Ideco when the record either was without evidence on that fact, contained disputed evidence of the fact, or conclusively established the fact in favor of Ideco. By acting as a fact finder and by assuming other facts in dispute, the Fifth Circuit exceeded its authority and completely undercut the purpose and justification that underlies the availability of summary judgment proceedings.

The Fifth Circuit's haste to force a judgment might be explained by this Court's decisions in *Celotex Corp. v. Catrett, supra,* and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986), both of which have been interpreted as encouraging the expanded use of summary proceedings. *See, Avia Group*

International, Ltd. v. L. A. Gear California, 853 F.2d 1557, 1560 (Fed. Cir. 1988); Comment, *The Supreme Court - Leading Cases,* 100 Harv. L. Rev. 100, 250, 252 (1986). These decisions were an attempt to resolve the confusion and distrust of summary judgments that had evolved since Rule 56 was adopted in 1938. *See,* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465 (1984); Currie, *Thoughts on Directed Verdicts and Summary Judgments,* 45 U. Chi. L. Rev. 72, 76-78 (1977).

If District Courts and courts of appeal are to be encouraged to utilize summary proceedings more often, the role of an appeals court in reviewing a grant of summary judgment, especially in the context of cross-motions filed in the District Court, takes on an increased importance in the orderly and efficient administration of the federal courts. If summary judgment is to be perceived as a legitimate and proper means of resolution and not as a "disfavored procedural shortcut," *Celotex Corp. v. Catrett, supra,* 477 U.S. at 327, Rule 56 must be applied with due regard for the procedural and substantive rights of all litigants. The case at bar is proof that summary judgment practice has not reached that level.

The improper review of the summary judgment by the Court of Appeals raises two constitutional issues. Because a timely jury demand had been made in this case, Ideco was entitled to a trial by jury on all disputed fact issues.[3] Although Ideco does not dispute that a proper grant of summary judgment does not violate the seventh amend-

3. After the District Court had stated its intention to enter judgment for Ideco, the parties waived the right to trial by jury on the damage issue only.

ment, *Fidelity & Deposit Co. v. United States,* 187 U.S. 315, 319-21, 47 L.Ed. 194, 23 S. Ct. 120 (1902), it is equally undisputed that a grant of summary judgment in a suit at law with disputed issues of material fact does deny a party the right to trial by jury. By acting as a finder of fact in this case, the Fifth Circuit denied Ideco its seventh amendment right to a trial by jury.

Granting summary judgment against Ideco based upon the assumption of facts adversely to Ideco and by ignoring uncontested evidence in favor of Ideco also constitutes a denial of due process of law. A summary judgment reached in accordance with the requirements of Rule 56 provides procedural due process. *Hill v. McDermott, Inc.,* 827 F.2d 1040, 1044 (5th Cir. 1987, *cert. denied,* ____ U.S.____, 98 L.Ed.2d 1014, 108 S.Ct. 1052 (1988). But when a Court of Appeals undertakes to act as an arbiter of facts in reviewing a summary judgment, the procedural safeguards of Rule 56 are destroyed and the party against whom the facts are found is denied both the procedural and the substantive due process required by the fifth amendment.

An additional ground justifying review of the case at bar is that the Fifth Circuit ignored the judicial admissions of Crocker in order to order the entry of judgment in Crocker's favor. In both its amended complaint and its summary judgment motion, Crocker asserted that it had resold the thirteen engines to Continental. Had that resale ocurred, any security Crocker might have had in the engines would have terminated. The Court of Appeals found, however, as a matter of fact, that no sale of the engines to Continental had occurred.

The intent of notice pleading is destroyed if a Court of Appeals can ignore a party's pleadings to make factual determinations outside the pleadings. A party's pleadings must serve as an admission against that party that defines the issues and limits the proof that can be offered by that party. Once a party admits that an event ocurred, as Crocker admitted the resale of the engines to Continental in its pleadings, a court must accept those admissions against the party that made them.

If a Court of Appeals is allowed to find facts in favor of a party that are directly contrary to the judicially admitted facts offered by the party, pleadings wholly fail to serve their intended purpose. A defending party can no longer be content to disprove an element of the plaintiff's case and receive a summary judgment if a Court of Appeals is free to redefine the issues by making factual findings outside the scope of the pleadings. In the instant case, the Fifth Circuit did just that to grant a summary judgment to Crocker that was not supported by Crocker's own pleadings. This Court should exercise review of this case to determine the extent that a reviewing court can find facts in favor of a party that are contrary to the pleaded admissions of that party.

CONCLUSION

The use and review of summary judgment proceedings has a history of distrust and disfavor in the federal courts. Recent attempts have been made to expand the use of the summary procedures established in Rule 56, but fair and efficient use of Rule 56 will never exist until the courts of appeal limit their review of summary judgments to questions concerning the existence of disputed material

facts. The case at bar presents a stark example of a reviewing court that ignored contested facts, undisputed facts, and judicial admissions and substituted its own view of the underlying facts to order judgment when Crocker clearly had not met its burden. The decision of the Fifth Circuit should be reversed and the case remanded for further review of the District Court's grant of summary judgment in favor of Ideco consistent with the purposes and limits of Rule 56.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been sent by certified mail, return receipt requested, to Mr. Tim S. Leonard, Kirklin & Boudreaux, 1800 InterFirst Plaza, Houston, Texas 77002, on this _____ day of March, 1990.

JAMES R. O'DONNELL

APPENDICES

APPENDIX A

CROCKER NATIONAL BANK,
Plaintiff-Appellant, Cross-Appellee,

and

T.O.S. Industries, Inc., d/b/a Texas Oilfield Supply,
Intervenor-Appellant, Cross-Appellee,

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Defendant-Appellee, Cross-Appellant.

No. 89-2149.

United States Court of Appeals,
Fifth Circuit.

Nov. 29, 1989.

Creditor with security interest in debtor's inventory brought action against seller of inventory to debtor to determine priority of their respective interests in inventory. The District Court, 660 F.Supp. 186, granted summary judgment for seller, and creditor appealed. The Court of Appeals, 839 F.2d 1104, affirmed and remanded. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., 702 F.Supp. 615, again held for seller, and creditor again appealed. The Court of Appeals held that debtor's return of inventory to unpaid seller did not extinguish creditor's security interest in such after-acquired inventory.

Reversed and remanded.

Tim S. Leonard, David Scott Curcio, Kirklin & Boudreaux, Houston, Tex., for defendant-appellee, cross-appellant.

James R. O'Donnell, Kevin F. Risley, Jeannette M. McAllister, Butler & Binion, Houston, Tex., for plaintiff-appellant, cross-appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before WISDOM, JOHNSON and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

This diversity case presents the question whether under the Texas U.C.C. a sale of a debtor's inventory has occurred when (1) the alleged buyer is an affiliate of the debtor, (2) the debtor takes delivery of the inventory from its seller at a facility it shares with the affiliate, (3) the debtor never pays its seller and the affiliate never pays the debtor, and (4) the debtor later transfers the inventory back to its seller in exchange for a release. We must resolve this question in order to determine whether the debtor's secured party here has priority over the unpaid seller with respect to the inventory. We also must determine whether the transfer back to the seller extinguished the security interest.

Crocker National Bank, the secured party, and T.O.S. Industries, the debtor, approve the district court's judgment that Crocker was not entitled to recover the value of certain engines subject to their security agreement. T.O.S. transferred the engines back to the seller, Ideco Division of Dresser Industries. We reverse the judgment of the district court and render judgment for Crocker

on its conversion claim against Ideco. The district court found the value of the engines to be $1,332,340.00. We reject Ideco's argument that this finding was clearly erroneous.

I

T.O.S. Industries was a supplier of oil field equipment. Crocker National Bank perfected a security interest under Article 9 of the Texas Uniform Commercial Code in all of T.O.S.'s after-acquired inventory.

Later, Ideco agreed to sell T.O.S. some drilling rigs and engines, which T.O.S. in turn planned to sell to its affiliate, Continental Drilling Company. T.O.S. later informed Ideco it did not need the rigs. Ideco delivered the engines to a facility in Owentown, Texas jointly owned by T.O.S. and Continental. The facility was identified in the Crocker-T.O.S. security agreement as a location of T.O.S.'s inventory. The shipment papers indicated the shipment was to Continental, but Ideco sent the invoices to T.O.S. T.O.S. in turn sent invoices to Continental.

T.O.S. did not pay Ideco for the engines or the rigs, and Continental never paid T.O.S. for them. T.O.S.'s financial fortunes were declining, so it made a massive transfer of its inventory to its creditors. At the same time, the engines were transferred back to Ideco, and Ideco gave T.O.S. credit memoranda and a release from its obligation.

Crocker, which had not specifically approved either T.O.S.'s proposed sale to Continental or the transfer of the engines back to Ideco, filed a complaint in conversion against Ideco in the district court. Crocker sought to recover the value of the engines and the rigs, claiming its security interest had priority over Ideco's interest as an unpaid seller. T.O.S. intervened as debtor in possession,

seeking to avoid the transfer to Ideco pursuant to 11 U.S.C. § 547(b). The district court granted summary judgment on all the claims in favor of Ideco, and Crocker and T.O.S. appealed. We affirmed the summary judgment only with regard to the rigs, and remanded the case to the district court to determine whether Ideco retained a possessory interest in the engines superior to Crocker's security interest. *Crocker National Bank v. Ideco Division of Dresser Industries,* 839 F.2d 1104 (5th Cir. 1988).

On remand, the district court rendered judgment in favor of Ideco, even though it found Ideco surrendered its possessory interest when it delivered the engines to the Owentown facility. The court gave several alternative grounds to support its decision. First, it concluded that Ideco delivered the engines to Continental, so T.O.S. never had possession and Crocker's security interest never attached. Second, the court held that even if T.O.S. had possession, Crocker's security interest was extinguished when T.O.S. returned the engines to Ideco. Third, the court held that if Continental held the engines as Ideco's bailee, Ideco properly exercised its rights as bailor by stopping the delivery from Continental to T.O.S. *Crocker National Bank v. Ideco Division of Dresser Industries,* 702 F.Supp. 615, 616-17 (S.D. Tex. 1988). Crocker and T.O.S. again appealed.[1]

II

We take a different view of the transaction than did the district court. We hold that the district court's finding that the engines were delivered to Continental instead

1. T.O.S. does not press its claims under 11 U.S.C. § 547(b) on this appeal. It merely adopts Crocker's arguments.

of T.O.S. was clearly erroneous, as was its alternative holding that Continental took delivery as bailee. Ideco's contract was with T.O.S. and it sent its invoices to T.O.S. T.O.S. stored its inventory at the Owentown facility. When the engines were returned, T.O.S., not Continental, received the credit memoranda and the release. We are thus persuaded T.O.S., not Continental, returned them. The shipping papers merely reflected T.O.S.'s plan that Continental would have use of the engines. Under this view, Crocker's security interest in the engines attached when they were delivered to Owentown. Tex. Bus. & Comm. Code Ann. § 9.203 (West Supp. 1989). Crocker's right to the engines as holder of a perfected security interest was superior to Ideco's claim as an unpaid seller no longer in possession. *Matter of Samuels & Co.*, 526 F.2d 1238 (5th Cir.), *cert. denied*, 429 U.S. 834, 97 S. Ct. 98, 50 L.Ed.2d 99 (1976); *Villa v. Alvarado State Bank*, 611 S.W.2d 483 (Tex. Civ. App.—Waco 1981, no writ). Ideco does not challenge the district court's holding that it surrendered its possessory interest at the time of delivery.

Instead, Ideco argues that T.O.S.'s alleged sale to Continental or its return of the engines to Ideco or both, were sales authorized by the security agreement that extinguished Crocker's security interest under § 9.306(b). The security agreement authorized T.O.S. to sell the collateral in the ordinary course of its business.

We are not persuaded that either transaction was sufficient to extinguish Crocker's security interest. There was insufficient evidence of a sale between T.O.S. and Continental. The Code defines a sale as the passing of title from a seller to a buyer for a price. Tex. Bus. & Comm.

Code Ann. § 2.106 (Vernon 1968). The engines were delivered to T.O.S. at Owentown and they were never moved. Continental never paid for them. The only evidence of a sale was the set of invoices T.O.S. sent to Continental, and the notation on Ideco's shipping documents that indicated delivery was to be made to Continental. This is not fatally inconsistent with there being a sale. See Tex. Bus. & Comm. Code Ann. § 2.401(c) (providing that unless the parties otherwise agree, where delivery is to be made without moving the goods, the goods are already identified to the contract, and no documents of title are to be delivered, title passes at the time and place of contracting). But T.O.S. transferred the engines back to Ideco. It could only have done that if it had title. This evidence persuades us that title never passed from T.O.S. to Continental.

Finally, the transfer of the engines back to Ideco was not in the ordinary course of T.O.S.'s business. The parties agree that the U.C.C. and the security agreement definition of sales in the ordinary course of business are the same. Section 1.201(9) excludes from the definition of "buyer in ordinary course of business" one who receives the property "in total or partial satisfaction of a money debt." Ideco received the engines in satisfaction of the money debt T.O.S. owed, so this sale does not qualify. See *Chrysler Credit Corporation v. Malone,* 502 S.W.2d 910 (Tex. Civ. App.—Fort Worth 1974).

Therefore, we reverse the judgment of the district court and remand to the district court for entry of judgment for Crocker. Compensatory damages for conversion in Texas are measured by the market value of the property at the place and on the day of the conversion. *Branham*

v. Prewitt, 636 S.W.2d 507 (Tex. App.—San Antonio 1982), *writ ref'd,* n.r.e. 643 S.W.2d 122 (Tex. 1983); *Hupp v. Brownsville Shipyard, Inc.,* 515 F.Supp. 546 (S.D. Tex. 1981). The district court valued the engines at $1,332,340.00 on the date they were sent back to Ideco. It made this determination based on the invoices Ideco sent T.O.S. and on testimony that this figure represented the value of the engines on the date of the transfer. There was contrary evidence but we do not find the district court's determination to be clearly erroneous. REVERSED and REMANDED.

APPENDIX B

CROCKER NATIONAL BANK,
Plaintiff,

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Defendant.

Civ. A. No. H-83-2988.

United States District Court.
S.D. Texas,
Houston Division.

Dec. 29, 1988.

Creditor with security interest in after-acquired inventory of buyer of drilling rigs and diesel engines brought action against seller, after buyer petitioned for bankruptcy relief, to determine relative priority of security interest. The District Court, 660 F.Supp. 186, granted summary judgment for seller, and creditor appealed. The Court of Appeals, 839 F.2d 1104, affirmed judgment and remanded in part. On remand, the District Court, Hughes, J., held that: (1) buyer never had possession of engines to allow creditor's security interest to attach; (2) assuming that buyer had actual possession of engines, any interest creditor had terminated at return of engines to seller; and (3) seller correctly intercepted delivery of engines to bailee when buyer informed seller that it was impecunious.

So ordered.

Tim Leonard, Houston, Tex., for plaintiff.

James R. O'Donnell, Houston, Tex., for defendant.

MEMORANDUM ON SUMMARY JUDGMENT

HUGHES, District Judge.

This court previously granted summary judgment in favor of Ideco Division of Dresser Industries, holding that its possessory security interest prevailed over the security interest of Crocker National Bank in drilling rigs and in several Caterpillar diesel engines. On appeal, this court's judgment was affirmed on the drilling rigs, and it was remanded on the engines. *Crocker Nat'l Bank v. Ideco Div.*, 839 F.2d 1104 (5th Cir. 1988). The court of appeals ruled that it was necessary to determine the relationship of Continental Drilling Company to the parties in this litigation specifically about the engines because the crucial issue was whether Ideco retained possession.

Crocker's security interest in T.O.S. inventory does not attach to the engines. First, the engines were never in the possession of T.O.S. Second, if Crocker had a security interest in the engines, the interest terminated when the engines were returned for full credit to the original vendor. Last, if Continental acted as a bailee at the time the contract was repudiated, Ideco had never relinquished possession of the engines to T.O.S. Accordingly, Ideco's motion for summary judgment will be granted.

Facts.

Crocker National Bank was the holder of a security interest in all of T.O.S.'s inventory wherever located, accounts receivable, general intangibles, and returned

goods. Ideco is the unpaid seller of the engines sold to T.O.S. Ideco invoiced T.O.S. on 30-day terms, noting a tax exempt sale for resale. Simultaneously, T.O.S. invoiced its customer Continental for the engines. In December 1981, Ideco shipped the engines directly to Continental at a storage facility used jointly by T.O.S. and Continental.

The engines remained at the storage facility until July 1982, when Ideco issued credit memoranda, executed a mutual release of contract with T.O.S., and retook possession of the engines.

Possession and Placement.

[1] According to Ideco's invoice, which also was incorporated into T.O.S.'s invoice to Continental, the engines were shipped to Continental Drilling Company at Highway 155 North, Tyler, Texas. The actual delivery of the engines was to Continental, not to T.O.S. T.O.S. did not have possession of the engines to allow Crocker's security interest to attach. The engines were never a part of T.O.S.'s inventory.

The engines were shipped to Continental at a storage facility used jointly by T.O.S. and Continental. The delivery of the engines to a dual capacity yard does not produce a possessory interest in T.O.S. to which Crocker's security interest can attach.

Return.

[2] Assuming T.O.S. had actual possession of the engines, making them a part of T.O.S.'s inventory, the security interest still does not subsist. The security and loan agreement states that all of T.O.S.'s inventory is to

be stored at specific locations and that T.O.S. will not, without first obtaining Crocker's written consent, remove the inventory from that location except for the purposes of sale in the regular course of its business. The return to the original vendor of the engines for full credit is a sale or exchange in the ordinary course of business. T.O.S. did not need Crocker's consent to return the engines to the original vendor for full credit. The exchange of the engines for full credit was authorized by the Crocker security agreement because the return of the engines was in the ordinary course of business. Inventory adjustment is a normal business operation which has only minimal potential for abuse to the detriment of the individual lender. Any interest Crocker had terminated at the return of the engines to Ideco. When Ideco obtained possession of the engines, Crocker and T.O.S. relinquished any claim to the engines.

Bailment.

[3, 4] Alternatively, if Continental was the bailee for the engines, Ideco had the right to stop delivery of the six engines from Continental to T.O.S. Delivery of the goods to T.O.S. was required before title passed to it. A seller has the right to stop delivery of goods that are in the possession of a carrier or other bailee when the buyer repudiates the contract. Tex. Bus. & Comm. Code § 2.703. When T.O.S. informed Ideco that it was impecunious Ideco correctly intercepted the delivery of the engines. Neither T.O.S. nor Crocker acquired any interest in the engines superior to Ideco's interest.

Value.

The actual value of the engines is a fact disputed by Crocker and Ideco. It will become useful only if Crocker is held on appeal to have obtained a security interest in the engines. Since on remand the evidence has already been taken, the finding of their value is made to obviate another remand. On the day they were returned to Ideco, the Caterpillar engines had an aggregate fair market value of $1,332,340.

Judgment will be granted for Ideco.

APPENDIX C

CROCKER NATIONAL BANK,
Plaintiff-Appellant,

and

T.O.S. Industries, Inc.,
Intervenor-Appellant,

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Defendant-Appellee.

No. 87-2634.

United States Court of Appeals,
Fifth Circuit.

March 15, 1988.

Creditor with security interest in after acquired inventory of buyer of drilling rigs brought suit against seller, after buyer petitioned for bankruptcy relief, to determine relative priority of security interests. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., 660 F.Supp. 186, granted summary judgment for seller, and creditor appealed. The Court of Appeals, Bright, Circuit Judge, sitting by designation, held that: (1) seller retained perfected security interest in rigs by its continued possession of them, and (2) where seller has never relinquished possession of goods, special property right acquired when goods are identified to contract in and of itself does not constitute sufficient right in collateral to enable buyer who has not paid for those goods to transfer security interest in them to third party.

Affrimed and remanded in part.

Ann Spiegel, Tim S. Leonard, H. Victor Thomas, Kirklin, Boudreaux & Joseph, Houston, Tex., for T.O.S. Industries, Inc. & Crocker Nat. Bank.

James R. O'Donnell, Kevin F. Risley, Butler & Binion, Houston, Tex., for defendant-appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, BRIGHT,* Senior Circuit Judge, and Gee, Circuit Judge.

BRIGHT, Senior Circuit Judge:

I. BACKGROUND

In this case we determine the security interests, and their relative priority, of appellee Ideco Division of Dresser Industries, Inc. (Seller), the unpaid seller-manufacturer of drilling rigs; appellant T.O.S. Industries, Inc. (Buyer), who agreed to purchase the drilling rigs; and appellant Crocker National Bank (Bank), the holder of a security interest in the Buyer's inventory.

Sometime in 1981, the Buyer agreed to purchase forty drilling rigs, their engines and control units, from the Seller. In January 1982, the Buyer informed the Seller that it did not need the rigs. The Seller, however, informed the Buyer that it was too far along in the manufacture of six of the rigs to cancel the order and that the

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* Senior Circuit Judge of the Eighth Circuit, sitting by designation.

Buyer would have to purchase these six rigs. The Seller continued to send invoices for the goods to the Buyer. These invoices stated that the goods were to be "held for shipping instructions" and contained an F.O.B. point of shipment term. The Seller retained possession of the rigs. The Seller accounted for the rigs as a sale and, accordingly, its records showed an increase in accounts receivable and a decrease in inventory.

In July 1982, the Seller stopped sending invoices for the six rigs and issued credit memoranda reflecting the cancellation of the Buyer's indebtedness and executed a mutual release with the Buyer whereby each party released the other from all contractual obligations arising from the sale of the six rigs.[1] At that time the Seller's books showed an increase in inventory and a decrease in accounts receivable. Approximately one month later, the Buyer filed for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101, *et seq.*

In May of the following year, the Bank filed its complaint in the district court, based on diversity of citizenship, 28 U.S.C. § 1331, asserting that it is entitled to recover the rigs, engines and control units from the Seller on the basis of a security interest in the inventory of the Buyer which it had perfected by the filing of financing statements. The Buyer moved to intervene, asserting that as debtor in possession it might avoid its transfer of the goods to the Seller.

Both the Bank and the Seller filed motions for summary judgment, each asserting a perfected security interest in the goods entitled to preference. The Honorable Lynn N.

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1. The Seller apparently sought a clear title in order to resell the rigs.

Hughes, United States District Judge for the Southern District of Texas, 660 F.Supp. 192, granted summary judgment in favor of the Seller, holding that the Seller's perfected purchase money security interest prevails over any interest held by the Bank. The court further held that the Buyer never possessed sufficient rights in the goods to convey a security interest to the Bank. Finally, the district court concluded that neither the Buyer nor the Bank acquired any interest superior to that of the Seller in the engines, which had been shipped to a third party, Continental Drilling Company.

This appeal followed.

II. DISCUSSION

Summary judgment shall be granted only when the moving party establishes that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing an order granting summary judgment we must consider the evidence in the light most favorable to the party opposing the motion, *McPherson v. Rankin*, 736 F.2d 175, 177-78 (5th Cir. 1984), *aff'd*, ____U.S.____, 107 S. Ct. 2891, 97 L.Ed.2d 315 (1987), and resolve all reasonable inferences in his favor, *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985). In this case, the relevant facts are not disputed but the parties reach differing legal conclusions on those facts.

(A) The Rigs

The Seller contends that it retained an interest in the rigs superior to any interest possessed by the Buyer or the Bank by virtue of its continued possession of the rigs.

[1] A seller who retains title to goods retains a security interest in those goods. § 2.401.[2] A security interest in goods obtained through continued possession by a seller for the purpose of securing the purchase price of the goods is a purchase money security interest. § 9.107. This security interest is perfected by the seller's continued possession of the goods. § 9.305.[3] Thus, so long as the Seller retains possession of the rigs in order to secure payment by the Buyer, its security interest remains perfected.

The Buyer and the Bank argue, however, that while the Seller retained physical possession of the rigs, the Buyer acquired constructive possession of them which served to oust the Seller of its security interest.

(1) Present Sale

[2] The Buyer and the Bank rely on the Code's "present sale" concept to support their argument.

Unless otherwise explicitly agreed, title to goods generally passes to the buyer when the seller completes his performance with reference to physical delivery of the goods. § 2.401(b). Section 2.401(c) contemplates an agreement that delivery shall take place without moving the goods. *See Borg-Warner Acceptance Corp. v. Massey-Ferguson*, 713 S.W.2d 351, 353 (Tex. Ct. App. 1985). The Buyer and the Bank rely on this latter section. They argue that the notation on the rig invoices to "hold for

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2. All references to sections are to the Texas Business & Commerce Code Annotated (Vernon 1968 and Supp. 1988), unless otherwise noted. We have reproduced pertinent code sections in the appendix to this opinion.

3. Section 9.113 recognizes the seller's security interest arising under Article 2 of the Code. Where the seller does not relinquish possession of the goods, no filing is required to perfect its security interest. § 9.113(2).

shipping instructions" evidence the agreed intent of Buyer and Seller that title shall pass at the time the rigs are identified to the contract and without physical delivery of them.

We reject this contention. The record unequivocally demonstrates that the parties never agreed to transfer title other than by delivery. The Code makes clear that the F.O.B. term is a delivery term, § 2.319(a), and that F.O.B. point of manufacture indicates that the seller must place the rigs in the hands of a common carrier at the point of manufacture. § 2.319(a)(1). Thus, the terms of the invoice oblige the Seller to deliver the rigs to a carrier. Title, therefore, passes only when that delivery obligation is met. § 2.401(b).[4]

The notation "hold for shipping instructions" does not conflict with the F.O.B. term. Whenever a sales agreement contains an F.O.B. term, except when the term is F.O.B. destination, the buyer must seasonably provide the seller with any needed shipping instructions. § 2.319(c). The "hold for shipping instructions" notation simply recognizes the buyer's "obligation of cooperation," comment 3 to § 2.319 with the seller. Those instructions, without more, do not effect the transfer of title of the goods to the Buyer.

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4. The circumstances here differ from those discussed by Donald L. Kreindler in his article *The Uniform Commercial Code and Priority Rights Between the Seller in Possession and a Good Faith Third-Party Purchaser*, 82 Comm. L.J. 86, 88 (1977), relied upon by appellants. Kreindler comments that "[i]n the absence of any clear contrary [contractual] provision, it would appear that the normal commercial understanding of an invoice denotes that title has passed upon the issuance of the invoice notwithstanding the seller's retention of possession." As we have discussed, the F.O.B. provision here clearly delineates Seller's delivery obligation and title will pass only when that obligation is met.

The Buyer and the Bank attempt to negate the effect of the F.O.B. term by pointing to the Buyer's business practice of storing its inventory with its seller until a resale buyer is found. This practice, they contend, at least creates a genuine issue of material fact as to whether a present sale was intended. The proffered evidence, however, relates to circumstances surrounding the Buyer's transactions with other parties, not the arrangement between these parties. Thus, we reject this contention of the Buyer and the Bank.

[3] The Buyer and the Bank also attempt to negate the F.O.B. term by referring to the Seller's accounting records reflecting an increase in its accounts receivable and a decrease in its inventory upon invoicing. These record transactions do not determine title. They represent bookkeeping procedures performed by the accounting department which do not negate the express delivery term of the agreement.

The district court therefore properly concluded under the undisputed evidence that no present sale occurred and that title to the rigs remained with Buyer.

(2) Rights in the Collateral

The Buyer and the Bank argue in the alternative that the Buyer obtained rights in the rigs sufficient to transfer a security interest to the Bank.

A security interest attaches and is enforceable against the debtor and third parties when (1) the collateral is in the possession of the secured party *or* the debtor has signed a security agreement containing a description of the collateral; (2) value has been given; and (3) the debtor has rights in the collateral. § 9.203(a). Here Buyer signed a security agreement with the Bank whereby the

Bank obtained a security interest in the Buyer's inventory. In return, the Bank advanced funds to the Buyer.

When goods are identified to a contract, a buyer acquires a special property and insurable interest in those goods. §§ 2.401(a), 2.501. The Buyer and the Bank argue that the special property interest which the Buyer acquired by identification of the six rigs to the contract constitutes a sufficient right in the collateral to permit the Bank's security interest to attach to the rigs.

The Uniform Commercial Code does not define the term special property interest. However, comment 3 to § 2.401 indicates that the special property interest is not a security interest but essentially relates to a purchaser's remedial rights. "[I]ts incidents are defined in provisions of the Article such as those on the rights of the seller's creditors, on good faith purchase, on the buyer's right to goods on the seller's insolvency, and on the buyer's right to specific performance or replevin."

The Buyer and the Bank argue that because § 9.203 does not specify any minimum quantum of rights in the collateral that must be held by a debtor before a security interest can attach, the special property interest is sufficient for a security interest to attach. The parties rely on *L.B. Smith, Inc. v. Foley*, 341 F.Supp. 810 (W.D. N.Y. 1972) and *In re County Green Ltd. Partnership*, 438 F.Supp. 693 (W.D. Va. 1977), but miss the important distinction in both of those cases that the buyer had physical possession of the goods to support the attachment of a security interest.

The court in *In re County Green* held that "the mere delivery of the appliances to the construction site for use on the construction project gave the debtor rights in the collateral for purposes of § [9.203]." 438 F.Supp. at 696.

In *County Green*, the buyer actually possessed the goods and thus the case is distinguishable from the present facts.

L.B. Smith, Inc. v. Foley arises in a different factual framework. There the Internal Revenue Service asserted a tax lien on two trailers delivered by the seller to the buyer pursuant to a conditional sales agreement. The buyer never made any payment to the seller for the trailers. The district court was called upon to determine the relative priorities of the IRS's tax lien and the unperfected interest of the unpaid seller. In determining whether or not the IRS's lien was perfected, the court examined the issue "whether and to what extent the taxpayer-conditional vendee had property and rights to property in the two Coastal Trailers to which the federal tax lien could attach." 341 F.Supp. at 813. The court concluded that "[w]hatever the full nature of this 'special property' interest in the buyer, it is of a nature sufficient to permit attachment of a lien by the buyer's creditor." *Id.* Although the court did not discuss the buyer's possession of the trailers, that change of possession to the buyer did occur and the opinion must be read and construed in light of the buyer's possession.[5]

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5. *L.B. Smith, Inc. v. Foley* is the basis for the statement that "a debtor has rights in the collateral if he * * * is a buyer with special property rights in goods by virtue of U.C.C. § 2-501, even though he has not yet acquired title under U.C.C. § 2-401 * * *." 8 ANDERSON, UNIFORM COMMERCIAL CODE § 9-203.45. The other case relied upon by Anderson for this proposition, *Holstein v. Greenwich Yacht Sales, Inc.*, 122 R.I. 211, 404 A.2d 842 (1979), is also distinguishable from this case. There the Rhode Island court held that the special property interest acquired by the buyer of an undelivered sailboat was superior to the security interest of the seller's floor-plan financer. *Holstein*, however, is distinguished because it did not determine the rights of the buyer as against the seller holder of a purchase money security interest in the goods. Retention of possession was not an issue in *Holstein*, while it is central to the rights of the parties here.

In *In the Matter of Samuels & Co.*, 526 F.2d 1238 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 834, 97 S. Ct. 98, 50 L.Ed.2d 99 (1976), this court focused on the importance of possession in determining the relative rights of parties claiming a security interest in property. The opinion addressed the following question: is the interest of an unpaid cash seller in goods already delivered to a buyer superior or subordinate to the interest of a bank, the holder of a perfected security interest in those same goods? *Id.* at 1241. This court held that the buyer had the right to encumber the goods upon their delivery having obtained that right upon acquiring possession of the goods. The decision rested upon possession. Indeed, as the opinion made clear, the bank's security interest attached *only* as a direct result of the seller's voluntary act of delivery of the cattle to the buyer without reserving any written security interest. *Id.* at 1247. *See Interfirst Bank of Abilene, N.A. v. Lull Mfg.*, 778 F.2d 228, 233 (5th Cir. 1985).

This case is different from *Samuels*. The Seller never delivered the rigs to the Buyer. Nevertheless, the analysis in *Samuels* is important here because it demonstrates the important role of possession in determining rights in collateral. *See Kinetics Technology Int'l Corp. v. The Fourth Nat'l Bank of Tulsa*, 705 F.2d 396 (10th Cir. 1983), where the court held that for a security interest to attach, a debtor must have some degree of control or authority over collateral placed in the debtor's possession.

The Seller in this case retained possession of the rigs at all times, thus preserving a purchase money security interest in them. The Buyer never paid for the rigs and never acquired any control over them. A holding that the

Buyer could transfer a security interest to the Bank would contravene the general principle that one cannot encumber another person's property. *See Kinetics Technology Int'l Corp.*, 705 F.2d at 398. As the district court noted, "[i]t would astonish the sellers of the world to discover that a seller who has not parted with goods nor received payment for them has an interest in the goods inferior to the creditor of a holder of an executory contract to buy them." Such a holding would offend the commercial expectations of all sellers who retain possession of goods to protect themselves against a defaulting buyer.[6]

[4] We thus hold that where the seller has never relinquished possession of the goods the special property right of § 2.401 in and of itself does not constitute a sufficient right in the collateral to enable a buyer who has not paid for those goods to transfer a security interest in them to a third party.

Accordingly, the district court properly entered summary judgment in favor of the Seller with respect to the rigs.

(B) The Control Units

The district court failed to address the control units. However, the record before us indicates that the control units remained at the Ross Hill Company where they had been stored since the Ross Hill Company manufactured them for the Seller. There is no evidence that

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6. One of a seller's remedies for non-payment by the buyer is to withhold delivery of the goods. § 2.703(a). The clear implication of § 2.703(a) is that the seller's right to withhold delivery under such circumstances is superior to any right held by the buyer or the buyer's creditors.

the control units were ever delivered to the Buyer. Thus, the above analysis with respect to the rigs applies to the control units and the summary judgment as granted included those items.

(C) The Engines

It appears from the record that the Caterpillar engines were delivered to a third party vendor Continental Drilling Company. However, the record is bare of explanation concerning the relationship of Continental Drilling Company to the Buyer and the Seller. Regardless, the Seller asserts that it exercised its right to reclamation of the rigs under § 2.705. The lack of evidence on this matter requires a remand of this portion of the case to the district court for further development of the record and appropriate disposition. As we have discussed, the crucial issue between the Seller and the Bank relates to whether or not the Seller retained a possessory interest in the goods.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court as applied to the drilling rigs and control units, but remand to the district court for further proceedings relating to the engines and the entry of an appropriate judgment as to these engines.

AFFIRMED AND REMANDED IN PART.

APPENDIX

§ 2.319. F.O.B. and F.A.S. Terms

(a) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(1) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this chapter (Section 2.504) and bear the expense and risk of putting them into the possession of the carrier; or

(2) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (Section 2.503);

(3) when under either Subdivision (1) or (2) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this chapter on the form of bill of lading (Section 2.323).

(b) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(1) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that

port or on a dock designated and provided by the buyer, and

(2) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(c) Unless otherwise agreed in any case falling within Subsection (a)(1) or (3) or Subsection (b) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this chapter (Section 2.311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(d) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

§ 2.401. Passing of Title; Reservation for Security; Limited Application of This Section

Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(a) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section

2.501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this title. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (Chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(b) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(1) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(2) if the contract requires delivery at destination, title passes on tender there.

(c) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(1) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(2) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(d) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale".

§ 2.501. Insurable Interest in Goods; Manner of Identification of Goods

(a) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are non-conforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(1) when the contract is made if it is for the sale of goods already existing and identified;

(2) if the contract is for the sale of future goods other than those described in Subdivision (3), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(3) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within

twelve months or the next normal harvest season after contracting whichever is longer.

(b) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(c) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

§ 2.703. Seller's Remedies in General

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2.612), then also with respect to the whole undelivered balance, the aggrieved seller may

(1) withhold delivery of such goods;

(2) stop delivery by any bailee as hereafter provided (Section 2.705);

(3) proceed under the next section respecting goods still unidentified to the contract;

(4) resell and recover damages as hereafter provided (Section 2.706);

(5) recover damages for non-acceptance (Section 2.708) or in a proper case the price (Section 2.709);

(6) cancel.

§ 2.705. Seller's Stoppage of Delivery in Transit or Otherwise

(a) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2.702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(b) As against such buyer the seller may stop delivery until

(1) receipt of the goods by the buyer; or

(2) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(3) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(4) negotiation to the buyer of any negotiable document of title covering the goods.

(c) (1) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(2) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(3) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(4) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

§ 9.107. Definitions: "Purchase Money Security Interest"

A security interest is a "purchase money security interest" to the extent that it is

(1) taken or retained by the seller of the collateral to secure all or part of its price; or

(2) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

§ 9.113. Security Interests Arising Under Chapter on Sales

A security interest arising solely under the chapter on Sales (Chapter 2) is subject to the provisions of this chapter except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(1) no security agreement is necessary to make the security interest enforceable; and

(2) no filing is required to perfect the security interest; and

(3) the rights of the secured party on default by the debtor are governed by the chapter on Sales (Chapter 2).

§ 9.203. Attachment and Enforceability of Security Interest; Proceeds. Formal Requisites

(a) Subject to the provisions of Section 4.208 on the security interest of a collecting bank, Section 8.321 on security interests in securities, and Section 9.113 on a security interest arising under the chapter on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(1) the collateral is in the possession of the secured party pursuant to agreement or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;

(2) value has been given; and

(3) the debtor has rights in the collateral.

(b) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in Subsection (a) have taken place unless explicit agreement postpones the time of attaching.

(c) Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by Section 9.306.

(d) A transaction, although subject to this chapter, is also subject to Title 79, Revised Civil Statutes of Texas, 1925, as amended, and in the case of conflict between the provisions of this Chapter and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein. [footnote omitted]

§ 9.305. When Possession by Secured Party Perfects Security Interest Without Filing

A security interest in letters of credit and advices of credit (Subsection (b)(1) of Section 5.116), goods, instruments (other than certificated securities), money, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this chapter. The security interest may be otherwise perfected as provided in this chapter before or after the period of possession by the secured party.

APPENDIX D

CROCKER NATIONAL BANK,
Plaintiff,

and

T.O.S. Industries, Inc.,
Intervenor,

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Defendant.

Civ. A. No. H-83-2988.

United States District Court,
S.D. Texas.
Houston Division.

April 29, 1987.

Creditor with security interest in after-acquired inventory of buyer of drilling rigs brought suit against seller, and buyer intervened. Creditor and seller moved for summary judgment. The District Court, Hughes, J., held that: (1) seller retained purchase money security interest in rigs in its possession superior to any interest of buyer or secured creditor, and (2) once seller of drilling rigs to buyer was told that buyer would not be able to pay for rigs, seller had right to stop delivery of rigs to buyer, and right included stopping of delivery of rigs from buyer's bailee to buyer.

Creditor's motion denied and seller's motion granted.

Arlen Driscoll, Atty. in Charge, Gilpin, Maynard, Parsons, Pohl & Bennett, Houston, Tex., for plaintiff.

Stephen R. Kirklin, Kirklin, Boudreaux & Joseph, Houston, Tex., for intervenor.

James R. O'Donnell, Butler & Binion, Houston, Tex., for defendant.

MEMORANDUM

HUGHES, District Judge.

TOS Industries, Inc., agreed to buy six drilling rigs from the Ideco Division of Dresser Industries, Inc. Before the six rigs were delivered, TOS told Ideco that it would be unable to pay for them, and Ideco kept the rigs. Crocker National Bank had a security interest in all after-acquired inventory of TOS.

Crocker and TOS contend that (1) TOS acquired title to the drilling rigs when Ideco sent TOS invoices of the sale, and that (2) Crocker's security interest attached to the drilling rigs. Ideco contends that (1) the title to the drilling rigs did not pass from Ideco to TOS because Ideco retained possession of the rigs and (2) Crocker's security interest does not encompass the drilling rigs so that even if title had passed, Crocker has no claim to the drilling rigs or their value. Ideco's possession of the drilling rigs and the engines gives it priority.

Background.

In late 1981, Ideco began to send TOS invoices for six rigs. The invoices identified which rigs in Ideco's possession were to be shipped. The payment and delivery terms in the invoices are: (1) thirty or ninety days net

and (2) F.O.B. manufacturer or F.O.B. Beaumont, hold for shipping instructions. Ideco sent TOS a letter confirming the agreement in January of 1982. Later, TOS told Ideco that it would not be able to pay for the rigs. In June of 1982, Ideco stopped sending invoices and issued credit memoranda to TOS in the amounts of the purchase prices of the rigs.

Ideco never shipped the drilling rigs. Six Caterpillar engines were sent to the Continental Drilling Company. These engines were components of the drilling rigs. Ideco asked Continental to return the engines to Ideco, and Continental did.

Before the invoicing began, Crocker loaned TOS money. Crocker received a security interest in all TOS after-acquired tubular goods, wellhead equipment, and oilfield supplies.

Claims.

Ideco has moved for summary judgment claiming that the Crocker security interest in all TOS after-acquired inventory did not attach to the rigs it had contracted to sell to TOS. Ideco argues that, if a contract was created, its terms required delivery according to TOS's instructions before title to the rigs passed to TOS. Without delivery, TOS never acquired title. Without title having passed to TOS, Crocker's security interest could not attach to the rigs. Even if title passed, Crocker's security interest could not attach since it did not encompass the drilling rigs.

Crocker has also moved for summary judgment claiming that, by the terms of the invoices and by the intention of the parties, a present sale was effected. A present sale

does not require actual delivery from the seller to the purchaser for title of the goods to pass; title passes on contracting or as soon as the goods are identified to the contract. Crocker contends that TOS, therefore, acquired title to the drilling rigs upon invoicing. With TOS's acquisition of title, Crocker's security interest attached to the rigs. If no present sale is found, Crocker argues that TOS received sufficient "rights in the collateral" for Crocker's interest to attach. TOS echoes Crocker.

Summary Judgment.

The party seeking a summary judgment must establish that: (1) no genuine dispute exists about any material fact, and (2) the law entitles it to judgment. Fed. R. Civ. P. 56(c); *Galindo v. Precision American Corp.*, 754 F.2d 1212 (5th Cir. 1984); *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983). Until the movant has properly supported the motion, no response is required. Once this is done, however, to preclude the rendition of a summary judgment, the nonmovant must present evidence demonstrating specific, contested facts that are material to the issues requiring adjudication. Fed. R. Civ. P. 56(e). For this purpose mere allegations or denials will not be sufficient. *Celotex Corp. v. Catrett*, ____U.S. ____, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, ____U.S.____, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Union Planters Nat. Leasing v. Woods*, 687 F.2d 117 (5th Cir. 1982).

After-acquired Inventory.

Crocker's security interest applies to all TOS tubular goods, wellhead equipment, and oilfield supplies. It is arguable that these drilling rigs are not encompassed by

that security interest. For purposes of this motion, the court assumes that these rigs and engines are part of TOS's inventory covered by the security interest.

The Contract.

There is an issue whether there was a contract for sale of the rigs between Ideco and TOS. A contract results when an offer has been presented and accepted, with consideration flowing between the parties. Ideco contends that no contract existed between TOS and it.

Some of the facts suggest the existence of a contract. Ideco issued invoices for the sale of six drilling rigs, identified by serial number. On January 27, 1982, the president of Ideco sent a letter confirming the existence of the Ideco-TOS agreement for these rigs. When TOS told Ideco that it could not pay for the rigs, Ideco issued credit memoranda to reverse its accounting entry of the sale.

The existence of a contract is a question of fact; however, if there was no contract, TOS and Crocker have no basis for asserting an interest in the rigs. The court will assume that a contract existed.

Ideco's Possessory Interest.

[1] Ideco retained an interest in the goods through possession, superior to any interest TOS or Crocker could have acquired. Two relevant code provisions place the interest of the possessing party above all others.

A seller may retain the title to goods shipped or delivered to the purchaser; this is a security interest. Tex. Bus. & Comm. Code §§ 2.401(a) and 2.505. This se-

curity interest is a purchase money security interest. Tex. Bus. & Comm. Code § 9.107(1). A purchase money security interest is superior to a prior interest in the inventory held by a third party if the purchase money security interest is perfected either by retained possession in the seller or if the conflicting interest holder is notified of the purchase money security interest before the purchaser receives possession of the collateral. Tex. Bus. & Comm. Code §§ 9.305 and 9.312(c). Here, Ideco retained possession of those drilling rigs it had completed. Those rigs not yet completed were not possessed by any party. But, if Ideco has the superior interest in the completed rigs, it must have the superior interest in the uncompleted rigs. Ideco's interest prevails over Crocker's.

[2] If Crocker's present sale argument were to be accepted and title to the drilling rigs passed to TOS upon invoicing, Ideco would have been the bailee of TOS's goods. Possession by a bailee cannot be stopped unless strict requirements are met. Tex. Bus. & Comm. Code § 2.705; *In re Samuels & Co.*, 526 F.2d 1238 (5th Cir. 1976). That code section, however, does not pertain to a situation where the bailee is also the seller, like here. Ideco, as bailee, perfected its security interest by informing itself it had possession of TOS's goods. *See* Tex. Bus. & Comm. Code §§ 9.304(c) and 9.305. Again, this security interest would be a purchase money security interest since the bailee's possession allows TOS to do with the goods as it wished. Tex. Bus. & Comm. Code § 9.107 (2). This purchase money security interest would also be superior to Crocker's security interest since Crocker had received notice of Ideco's interest prior to TOS's receiving possession of the drilling rigs. Tex. Bus. & Comm. Code § 9.312(c).

Other sections evince the seller's superior interest in its property. A seller can stop delivery of goods when it is not paid or the buyer becomes insolvent. Tex. Bus. & Comm. Code §§ 2.703 and 2.705. These sections demonstrate that the rights of a seller, although not paramount in all situations, are substantial and, usually, divest any rights that may be held by others.

Against this presumptive lack of a cognizable interest, TOS argues that the agreement between it and Ideco transferred a superior interest in the rigs to TOS. TOS claims that upon invoicing title to the rigs was transferred to it. If that argument fails, TOS claims that it obtained sufficient "rights in the collateral" to acquire a prevailing interest in the drilling rigs over that retained by Ideco. Both arguments fail.

Present Sale.

[3] Crocker contends that the invoices' delivery terms apply to a future delivery by Ideco to a third-party purchaser from TOS and that, upon invoicing, title to the rigs was transferred from Ideco to TOS. Ideco counters that the contract's shipping terms show a sale requiring delivery, at minimum, to a common carrier before title passes. Ideco is correct.

A present sale occurs when "delivery is to be made without moving the goods, . . . if the goods are at the time of contracting already identified and no documents are to be delivered. . . ." Tex. Bus. & Comm. Code § 2.401(c). In a present sale, title to the goods passes at the time and place of the contracting.

Even assuming that the goods were identified and no documents were to be delivered between the parties, the

statute requires that the parties intend to effect delivery without moving the goods. *Id.* Here, there is no evidence of this requisite intent except the rather plain and usual terms on the invoices; these do not invoke § 2.401(c), but (b).

Crocker urges that the facts of this case establish an agreement for a present sale. *Am. Petrofina, Inc. v. PPG Industries, Inc.*, 679 S.W.2d 740 (Tex. Civ. App.—Fort Worth 1984, writ dism'd by agr.); *Liberty Enter., Inc. v. Moore Transp. Co., Inc.*, 679 S.W.2d 779 (Tex. Civ. App.—Fort Worth 1984), *aff'd*, 690 S.W.2d 570 (1984); *Miles v. Starks*, 590 S.W.2d 223 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.), *cert. denied*, 449 U.S. 875, 101 S. Ct. 217, 66 L.Ed.2d 96 (1980). Crocker bases this argument on these facts: (1) Ideco was in the practice of holding bulky equipment on its property after it had been sold until it shipped the goods according to the purchaser's instructions; (2) TOS was in the practice of storing bulky goods it had purchased on the seller's property until TOS sent the seller shipping instructions; and (3) the thirty and ninety days net terms are a credit sale and not a cash sale so payment was not required before TOS's actual possession of the drilling rigs.

Evidence of the practices of Ideco and TOS is parol evidence and is inadmissible unilaterally in sales over $500. Tex. Bus. & Comm. Code § 2.201(a). For the purpose of this motion, the court will take Crocker's three assertions as true and admissible.

[4] This evidence could demonstrate a course of performance between the parties. Tex. Bus. & Comm. Code §§ 2.202 and 2.208. The evidence fails. First, for Ideco to store sold goods on its property until it received ship-

ping instructions from the buyer is consistent with sales that must be consummated by delivery, whether it is delivery at Ideco's plant or elsewhere. Further, holding huge equipment for shipping instructions is more a function of transportation costs than intention about title, and the practice does not, in itself, establish that Ideco intended to transfer title in this case. TOS's practice of storing goods that it had purchased on the seller's property is similar.

[5, 6] The days-net terms merely establish a credit sale and do not show anything about a present sale. A credit sale cannot be equated with a present sale; a credit sale may require actual delivery from the hands of the seller to the hands of the purchaser while the essence of a present sale is the absence of a requirement of an actual transfer.

[7] The express terms of the invoices, in fact, evince the intention not to enter a present sale. The f.o.b. and hold for shipping instructions terms show that a physical transfer of the rigs was required before the sale was consummated. Crocker argues that these terms are not inconsistent with a present sale. That argument is circular because it assumes the existence of a present sale.

Rights in the Collateral.

[8] TOS must have acquired "rights in the collateral" for Crocker's security interest to apply to the drilling rigs. The question TOS presents is: Does a buyer (1) who has not paid for goods and (2) to whom they have not been delivered have sufficient rights in the goods to grant a security interest in them to another that takes precedence over the manufacturer's retained security interest perfected by possession? The answer is no.

[9] A security interest does not attach until: (1) the debtor signs a security agreement covering the collateral, (2) the secured party gives value to the debtor, and (3) the debtor has rights in the collateral. Tex. Bus. & Comm. Code § 9.203(a). The first two requirements are met. The third provision is the problem. Even if Crocker acquired a special property interest from TOS, that interest is inferior to the seller's property interest created by possession.

Excluding the seller's creditors, a seller who has not received payment from or delivered goods to a purchaser has the dominant property interest in the goods. There is nothing in "special property" to suggest those limited interests divest the seller's paramount claim. Nothing "suggests that the special property interest carries paramount rights with it. . . . The scope and relative priority of that interest depend on other Code sections." Dolan, *The Uniform Commercial Code and the Concept of Possession in the Marketing and Financing of Goods*, 56 Tex. L. Rev. 1147, 1156 (footnotes omitted). Nothing "supports the claim of a creditor of an insolvent buyer who has not paid for identified, undelivered goods." *Id.* at 1158 n.56. It would astonish the sellers of the world to discover that a seller who has not parted with goods nor received payment for them has an interest in the goods inferior to the creditor of a holder of an executory contract to buy them.

The fallacy of Crocker's position is made evident through a hypothetical. Assume that Ideco had agreed to build six rigs for TOS, but after completing and identifying them, Ideco announced that it had made a better deal with someone else and breached the contract. This reverses the case facts. TOS would not have a sufficient property interest in the rigs that were identified yet un-

delivered to sustain a claim for possession against Ideco. TOS would be relegated to a breach of contract claim. Conversion would not lie for Ideco's refusal to ship the rigs to TOS without payment because, whatever special property it may have, TOS would not have an unqualified right to possession.

Even if Ideco is considered the bailee of the drilling rigs for TOS, Ideco's right to retain possession is superior to Crocker's security interest. Ideco retained possession of the rigs in whatever capacity and that possession perfected its superior security interest. Ideco needed to do no more.

The Caterpillar Engines.

[10] If Continental was TOS's bailee, Ideco had the right to stop delivery of the six engines from Continental to TOS. Delivery of the goods to TOS was required before title passed to it. A seller has the right to stop delivery of goods that are in the possession of "a carrier or other bailee" when the buyer repudiates the contract. Tex. Bus. & Comm. Code § 2.703. When TOS informed Ideco that it was impecunious, Ideco correctly intercepted the delivery of the engines. Neither TOS nor Crocker acquired any interest in the engines superior to Ideco's interest.

Conclusion.

Since Ideco, whether it is viewed as a bailee for TOS or as an owner, retained and perfected a purchase money security interest in the goods superior to Crocker's conflicting security interest in TOS's inventory, Ideco prevails. Even if a present sale were effected, the security interest of Crocker in after-acquired inventory of TOS is inferior

to Ideco's security interest as a possessory unpaid seller. The passage of title and the existence of a special property are not determinative of the priority of claims question. No present sale occurred here since the invoices show a credit sale with delivery required before title would pass.

Once Ideco was told that TOS would not be able to pay for the rigs, Ideco also had the right to stop delivery of these rigs to TOS. This right included stopping the delivery of the engines from Continental to TOS, with Continental the bailee of TOS.

Crocker's motion for summary judgment will be denied. Ideco's motion for summary judgment will be granted, quieting title to the six rigs and engines in Ideco.

FINAL JUDGMENT

Crocker National Bank and TOS Industries, Inc., take nothing against the Ideco Division of Dresser Industries, Inc. Costs are taxed against Crocker and TOS.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2149

D.C. Docket No. H-83-2988

CROCKER NATIONAL BANK,
Plaintiff-Appellant Cross-Appellee,

and

T.O.S. INDUSTRIES, INC. d/b/a
TEXAS OILFIELD SUPPLY,
Intervenor-Appellant Cross-Appellee,

versus

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Defendant-Appellee Cross-Appellant.

Appeals from the United States District Court for the
Southern District of Texas

(Filed February 2, 1990)

Before WISDOM, JOHNSON, and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee cross-appellant pay to plaintiff-appellant cross-appellee the costs on appeal to be taxed by the Clerk of this Court.

November 29, 1989

ISSUED AS MANDATE: January 31, 1990

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2149

CROCKER NATIONAL BANK,
Plaintiff-Appellant Cross-Appellee,

and

T.O.S. INDUSTRIES, INC., d/b/a
TEXAS OILFIELD SUPPLY,
Intervenor-Appellant Cross-Appellee,

versus

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Defendant-Appellee Cross-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(January 11, 1990)

Before WISDOM, JOHNSON and HIGGINBOTHAM,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ PATRICK E. HIGGINBOTHAM
United States Circuit Judge

CLERK'S NOTE:

See FRAP and Local Rules 41 for Stay of the Mandate.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-2988

CROCKER NATIONAL BANK

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.

(Filed May 10, 1983)

COMPLAINT

The Complaint of CROCKER NATIONAL BANK ("CROCKER"), Plaintiff, against the IDECO DIVISION OF DRESSER INDUSTRIES, INC. ("DRESSER"), Defendant, states the following:

I.

Jurisdiction of this civil action is founded on diversity of citizenship and amount. CROCKER is a national banking association having its principal place of business in the State of California. DRESSER is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in a state other than the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand and No/100 Dollars ($10,000.00).

II.

On or about August 10, 1981, T.O.S. INDUSTRIES,

INC., a Texas corporation ("TOS"), sometimes doing business under the name of "Texas Oilfield Supply", entered into a security and loan agreement with CROCKER providing for a secured loan by CROCKER to TOS. The amount of the indebtedness of TOS to CROCKER for such loan is now, and at all times material to this suit, has been more than Thirty Million and No/100 Dollars ($30,000,000.00).

III.

As security for its indebtedness to CROCKER, TOS granted CROCKER a security interest, among other things, in all of its accounts receivable, general intangibles, returned goods, and its inventory. That security interest was perfected by a financing statement duly filed August 3, 1981, under File No. 81-152713, as Amended by Financing Statement duly filed August 31, 1981, under File No. 81-15296 with the office of the Secretary of State of the State of Texas. CROCKER at that time became and is now the holder of a security interest in the returned goods and inventory of TOS that is perfected and enforceable against third parties, such as and including DRESSER.

IV.

On August 10, 1982, TOS filed a petition under Chapter 11 of Title 11 of the United States Code. Pursuant to the provisions of Section 362(a) of Title 11, the filing of such petition operates as a stay of the commencement or continuation, including the issuance or employment of process, of a judicial proceeding against TOS that could have been commenced before the filing of such petition. For that reason, TOS could not be joined as a party

hereto, but TOS is not a person whose joinder herein is required by law.

V.

DRESSER, from time to time, has sold goods to TOS, including drilling rigs and related accessory products. Such goods were sold to TOS for resale by TOS or to be held by TOS for sale or lease to its customers. In any event, TOS became heavily indebted to DRESSER in amounts which apparently exceeded Nine Million, Four Hundred Sixty-Three Thousand, Two Hundred Sixty-Two and No/100 Dollars ($9,463,262.00).

VI.

DRESSER made arrangements with TOS for the collection of the indebtedness owed by TOS to DRESSER. Pursuant to these arrangements, on or about July 12, 1982, in cancellation of indebtedness owed by TOS to DRESSER, TOS transferred drilling rigs and related accessory products to DRESSER out of the TOS inventory, and DRESSER issued credit memoranda reflecting the cancellation of such indebtedness. Such TOS transfers to DRESSER reflected in the credit memoranda on or about July 12, 1982, included the following:

(a) TOS transferred to DRESSER rig components and accessory products under Sales Return No. D1/B0091 through D1/B0091-6. The components are described and have serial numbers as follows:

SCR System	
UTB-360-5-42 Block	370
LR-275 Rotary	683
TL-300 Swivel	280

2 Caterpillar D-398 Power Units	35Z01139 35Z01140
1 Caterpillar D-379 Power Unit	34Z00864
ED-1200 Hoist	227
Dretech Model 3550 Brake	8116
2 GE-752 Electric Motors	7544015, 7544168

TOS was issued a credit memorandum for return of the components in the total amount of One Million, Four Hundred One Thousand, One Hundred Sixteen and No/100 Dollars ($1,401,116.00).

(b) TOS transferred to DRESSER rig components and accessory products described under Sales Return No. D1/B0128 through D1/B0128-7. The components are described and have serial numbers as follows:

1 Foster Model 24-AH Breakout Cathead	1876
1 Foster Model 37-AH Spinning Cathead	1555
LR-275 Rotary	581
1 Caterpillar D-399 Power Unit	36Z01204
1 Caterpillar D-398 Power Unit	35Z01143
Caterpillar D-379 Power Unit	34Z00866
SCR System	
E-1700 Hoist	MM245
Dretech Model 5250 Brake	8086
2 GE-752 Electric Motors	7543866, 7544055
TL-400 Swivel	181
UTB-525-6-50 Block	630
2 T-1300 Pumps	199, 204
2 T-1300 Pump Drives	967, 968
4 GE-752 Electric Motors	7543852, 7543881, 7544122, 7543916

TOS was issued a credit memorandum for the return of the above referenced components in the amount of Two Million, Three Hundred Thirty-One Thousand, Three Hundred Twelve and No/100 Dollars ($2,331,312.00).

(c) TOS transferred to DRESSER rig components and accessory products described in Sales Return No. D1/B0093 through D1/B0093-5. The components are described and have serial numbers as follows:

UTB-360-5-42 Block	369
2 Caterpillar D-398 Power Units	35Z01141 35Z01142
1 Caterpillar D-379 Power Unit	34Z00865
SCR System	
LR-275 Rotary	619
TL-300 Swivel	287
ED-1200 Hoist	229
Dretech Model 3550 Brake	8087
2 GE-752 Electric Motors	7544117, 7544090
1 Foster Model 37-AH Spinning Cathead	1574
1 Foster Model 24-AH Breakout Cathead	1960

TOS was issued a credit memorandum for return of the above referenced components in the total amount of One Million, Four Hundred Seven Thousand, One Hundred Ninety and No/100 Dollars ($1,407,190.00).

(d) TOS transferred to DRESSER rig components and accessory products described in Sales Return No. D1/B0094 through D1/B0094-5. The components are described and have serial numbers as follows:

UTB-360-5-42 Block	371
SCR System	
2 Caterpillar D-398 Power Units	35Z01223 35Z01227
1 Foster Model 37-AH Spinning Cathead	1407
1 Foster Model 24-AH Breakout Cathead	2122
1 Caterpillar D-379 Power Unit	34Z00938
TL-300 Swivel	289
ED-1200 Hoist	230
Dretech Model 3550 Brake	8139
2 GE-752 Electric Motors	7544088, 7544099

TOS was issued a credit memorandum for the return of the above referenced components in the total amount of One Million, Three Hundred Thirty-Three Thousand, Eight Hundred Ninety-Eight and No/100 Dollars ($1,333,898.00).

(e) TOS transferred to DRESSER rig components and accessory products described in Sales Return No. D1/B0096 through D1/B0096-6. The components are described and have serial numbers as follows:

UTB-360-5-42 Block	219
SCR System	
LR-275 Rotary	634
TL-300 Swivel	292
2 T-1000 Pumps	MI-269, JS-192
Pump Gages, Valves, Puls. Damp. Pullers	
2 T-1000 Pump Drives	923, 924
2 GE-752 Electric Motors	
2 Caterpillar D-398 Power Units	35Z01322 35Z01323
1 Caterpillar D-379 Power Unit	34Z00939

TOS was issued a credit memorandum for the return of the above referenced components in the total amount of One Million, Five Hundred Fifty-Four Thousand, Five Hundred Fifty-Six and No/100 Dollars ($1,554,556.00).

(f) TOS transferred to DRESSER rig components and accessory products described in Sales Return No. D1/B0130 through D1/B0130-4. The components are described and have serial numbers as follows:

SCR System	
LR-275 Rotary	624
TL 400 Swivel	190
1 Foster Model 37-AH Spinning Cathead	1414
1 Foster Model 24-AH Breakout Cathead	1872
1 Caterpillar D-399 Power Unit	36Z01497
1 Caterpillar D-398 Power Unit	35Z01324
Caterpillar D-379 Power Unit	34Z00941
E-1700 Hoist	MM-249
Dretech Model 5250 Brake	8109
2 GE-752 Electric Motors	7544005, 7540123

TOS was issued a credit memorandum for the return of the above referenced components in the total amount of One Million, Four Hundred Thirty-Five Thousand, One Hundred Ninety and No/100 Dollars ($1,435,190.00).

VII.

CROCKER has not determined all of the details or the extent of the arrangements DRESSER made with TOS for collection of its claims against TOS, and has

not determined whether other collateral has been transferred to DRESSER from the collateral for CROCKER'S claims against TOS. These details are well known to DRESSER and will be discovered by CROCKER in this case.

First Claim for Relief
Recovery of Collateral

CROCKER is entitled to recover from DRESSER all goods that were in the TOS inventory, including the above referenced drilling rigs returned to DRESSER. All such goods are subject to CROCKER'S security interest. Under the provisions of applicable law, the CROCKER security interest continued in such goods, notwithstanding the sale, exchange or other disposition by TOS. The indebtedness owed by TOS to CROCKER is due, and CROCKER is entitled to take possession of such goods for purposes of foreclosure. DRESSER was not a "buyer in the ordinary course of business" from TOS entitled to take free of CROCKER'S security interest because the transfers were made as security for or in satisfaction of the indebtedness of TOS to DRESSER. Moreover, CROCKER avers that DRESSER did not act in good faith in obtaining such goods. Should the facts discovered by CROCKER show it necessary before trial, CROCKER may be required to obtain writs or to move for an order of injunction to prevent DRESSER from disposing of any of such goods.

Second Claim for Relief
Determination of Priorities

Any retention or reservation by DRESSER of title to such goods was done to secure payment or performance of TOS'S indebtedness to DRESSER. As a matter of law,

the only interest of DRESSER in such goods is a security interest that is not perfected as required by law and is not enforceable against CROCKER. CROCKER is entitled to determination and judgment that its security interest and claims to such goods are first, prior and superior to any claims held by DRESSER to such goods.

Third Claim for Relief
Recovery of Damages

CROCKER has not yet asserted but may later assert other claims against DRESSER, including but not limited to claims for conversion of its collateral. If so, CROCKER will amend this Complaint after sufficient discovery has proceeded to enable CROCKER to discover the facts regarding what DRESSER has done with the collateral for the TOS indebtedness to CROCKER.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, CROCKER NATIONAL BANK, prays that summons issue to Defendant, IDECO DIVISION OF DRESSER INDUSTRIES, INC.; that the Court issue such writs or other orders prior to trial as are appropriate; that upon trial, Plaintiff have judgment for recovery of all goods in the possession of Defendant subject to the security interests in favor of the Plaintiff, for damages for any such goods converted to the use or benefit of the Defendant, and that the claim of the Plaintiff to such goods is first, prior and superior to any claim of Defendant; and that Plaintiff have such other and further relief, general and special, at law and in equity, to which it may show itself to be justly entitled.

DATED this the 10th day of April, 1983.

Respectfully submitted,

/s/ JOHN H. BENNETT JR.
John H. Bennett, Jr.
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Attorney in Charge for Plaintiff,
CROCKER NATIONAL BANK

OF COUNSEL:

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PLAINTIFF DEMANDS TRIAL BY JURY.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-2988

CROCKER NATIONAL BANK, and
T.O.S. INDUSTRIES, INC. d/b/a
TEXAS OILFIELD SUPPLY,
Plaintiff,

v.

IDECO DIVISION OF DRESSER INDUSTRIES, INC.,
Defendant.

PLAINTIFFS' FIRST AMENDED COMPLAINT

To The Honorable United States District Judge:

COME NOW, CROCKER NATIONAL BANK ("Crocker") and T.O.S. INDUSTRIES, INC. d/b/a TEXAS OILFIELD SUPPLY ("T.O.S."), as Plaintiffs, and file this their First Amended Complaint against IDECO DIVISION OF DRESSER INDUSTRIES, INC. ("Ideco"), Defendant, and in support of this Amended Complaint state the following:

I.

Jurisdiction in this civil action is based on 28 U.S.C. § 1331, and 11 U.S.C. §§ 547, 549. The matter in controversy, exclusive of interests and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00) and arises under the laws of the United States.

II.

Plaintiffs Crocker and T.O.S. hereby file this Amended Complaint pursuant to Federal Rules of Civil Procedure 15 such that Plaintiffs' pleadings will conform to the evidence and the opinion of *Crocker National Bank v. Ideco Division of Dresser Industries, Inc.*, 839 F.2d 1104 (5th Cir. 1988).

III.

Ideco, from time to time has sold goods to T.O.S. Such goods were sold to T.O.S. for resale by T.O.S. or to be held by T.O.S. for sale or lease to its customers.

IV.

Ideco sold to T.O.S. and shipped to Continental Drilling Company ("Continental") a total of thirteen caterpillar engines. Continental in turn purchased these said engines from T.O.S. The thirteen engines in question are listed as follows:

Caterpillar D-399 Packaged Electric Set	
Cat D-399 Engine	35B06578
KATO Generator	84425-4
O & M Radiator	130-263
Caterpillar D-398 Packaged Electric Set	
Cat D-398 Engine	66B09262
KATO Generator	84426-10
O & M Radiator	129-191
Caterpillar D-379 Packaged Electric Set	
Cat D-379 Engine	34Z00784
KATO Generator	84426-19
O & M Radiator	129-231

Caterpillar D-399 Packaged Electric Set	
Cat D-399 Engine	35B06584
KATO Generator	94425-5
O & M Radiator	128-834
Caterpillar D-399 Packaged Electric Set	
Cat D-399 Engine	35B6582
KATO Generator	86612-1
O & M Radiator	128-836
Caterpillar D-398 Packaged Electric Set	
Cat D-398 Engine	66B9263
KATO Generator	84426-11
O & M Radiator	129-192
Caterpillar D-379 Packaged Electric Set	
Cat D-379 Engine	34Z786
KATO Generator	84426-12
O & M Radiator	129-232
Caterpillar D-398 Packaged Electric Set	
Cat D-398 Engine	66B9230
KATO Generator	84426-16
O & M Radiator	129-005
Caterpillar D-398 Packaged Electric Set	
Cat D-398 Engine	66B9271
KATO Generator	84426-17
O & M Radiator	129-008
Caterpillar D-379 Packaged Electric Set	
Cat D-379 Engine	34Z774
KATO Generator	84426-18
O & M Radiator	128-973

Caterpillar D-398 Packaged Electric Set	
Cat D-398 Engine	66B9272
KATO Generator	84426-2
O & M Radiator	129-007
Caterpillar D-398 Packaged Electric Set	
Cat D-398 Engine	66B9273
KATO Generator	84426-3
O & M Radiator	129-006
Caterpillar D-379 Packaged Electric Set	
Cat D-379 Engine	34Z783
KATO Generator	84426-20
O & M Radiator	128-972

Ideco first attempted to reclaim the said engines on or about mid-July, 1982.

V.

On or about August 10, 1981, T.O.S. entered into a Security and Loan Agreement with Crocker providing for a secured loan by Crocker to T.O.S. The amount of indebtedness of T.O.S. to Crocker for such loan is now, and at all times material to this suit, has been more than Twenty Million Dollars and No/100 ($20,000,000.00).

VI.

As security for its indebtedness to Crocker, T.O.S. granted Crocker a security interest, among other things, in all after acquired inventory of T.O.S. wherever located. That security interest was perfected by a Financing Statement duly filed August 3, 1981, under file number 81-152713, as amended by Financing Statement duly filed

August 31, 1981, under file number 81-15296 with the office of the Secretary of State of the State of Texas. Crocker at that time became and is now the holder of a security interest in all the inventory of T.O.S. wherever located that is perfected and enforceable against third-parties, such as and including Ideco.

VII.

Ideco delivered the said thirteen caterpillar engines on or about December 8, 1981 and December 23, 1981 to Continental Drilling Company, the address of Continental Drilling Company being a joint storage facility of T.O.S. and Continental and one of the places where T.O.S. maintains its inventory. At the very moment of delivery, Crocker's security interest attached to the said engines giving Crocker priority over any interest of Ideco due to Ideco's forfeiture of possession of the engines.

VIII.

Plaintiffs allege that when Ideco repossessed the engines from at least the time of August 1, 1982, that Ideco did so wrongfully and without justification in view of Crocker's priority interest in the engines. Such action of Ideco constitutes a conversion for which Plaintiffs are entitled to recovery.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, Crocker National Bank and T.O.S. Industries, Inc. d/b/a Texas Oilfield Supply, pray that the Plaintiffs have judgment for the value of the said thirteen engines converted to the use or benefit of the Ideco Division of Ideco Industries, Inc. in the amount of One Million Seven Hundred and Eight Thousand One Hundred and Twenty-

Seven Dollars and No/100 ($1,708,127.00), that Plaintiffs have pre- and post-judgment interest at the maximum rate allowable by law, and for such other and further relief, general and special, at law or in equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/ TIM S. LEONARD
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APPENDIX I

U.S. CONST amend. V

AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VII

AMENDMENT VII — CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 56(d)

Rule 56. Summary Judgment

(c) Motion and proceedings thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX J

Listing Of All Non-Wholly Owned Subsidiaries
And Affiliates Of Dresser Industries, Inc.
Pursuant To Sup. Ct. R. 28.1

Name	*State or Other Sovereign Under The Laws Of Which Organized*
Airetool & Yost Superior Realty, Inc.	Ohio
Aldia, S.A.	Algeria
Baramin S.A. de C.V.	Mexico
Dresser Oilfield Gabon S.A.R.L.	Gabon
Dresser-Rand Company (Partnership)	New York
Dresser Machinery Repair Belgie N.V.	Belgium
Dresser-Rand B.V.	Netherlands
Dresser-Rand Canada, Inc.	Canada
Dresser-Rand Compression Services, S.A.	Switzerland
Dresser-Rand GmbH	West Germany
Dresser-Rand Holding Company	Delaware
Dresser-Rand Overseas Sales Company	Delaware
Dresser-Rand (U.K.) Ltd.	England
Dresser-Rand Sales Company S.A.	Switzerland
Dresser-Rand Services S.A.R.L.	Switzerland
Southwest Industries, Inc.	Delaware
Turbodyne Electric Power Company	Delaware
TEPCO/Pembroke Power, Inc.	Delaware
Dresser-Rand Italia S.r.L.	Italy
Dresser-Rand Japan Ltd.	Japan
Dresser-Rand S.A.	France
Dresser-Rand Service Personnel B.V.	Netherlands
Dresser-Rand de Venezuela S.A.	Venezuela
Dresser-Rand Power, Inc.	Delaware

Name	*State or Other Sovereign Under The Laws Of Which Organized*
Dresser-Rand Comercio e Industria Ltda.	Brazil
Dresser-Rand Power A/S	Norway
Dresser-Rand (SEA) Pte. Ltd.	Singapore
M-I Drilling Fluids Company (Partnership)	Texas
Avon Mineracao e Industria Ltda.	Brazil
Bartina de Bolivia Limitada	Bolivia
Dresser Mineracao Ltda.	Brazil
Dresser do Brasil, Ltda.	Brazil
M-I Australia Pty. Ltd.	Australia
M-I Drilling Fluids Company GmbH	Austria
M-I Drilling Fluids Foreign Sales Corporation, Ltd.	Guam
M-I Drilling Fluids International, B.V.	Netherlands
Mykobar Mining Company, S.A.	Greece
M-I Drilling Fluids de Venezuela C.A.	Venezuela
M-I Gabon S.A.	Gabon
M-I Great Britain Limited	England
M-I Italiana S.p.A.	Italy
Data Units S.r.L.	Italy
M-I Norge A/S	Norway
M-I Overseas Limited	Cayman Islands
M-I Drilling Fluids (Singapore) Pte. Ltd.	Singapore
Magcobar (Ireland) Limited	Ireland
Foynes Manufacturing Limited	Ireland
Management & Engineering Resources Company	Bermuda
Radio Magcobar, Inc.	Texas
Magcobar-OSCA Ltd.	Scotland
Macobar-OSCA Italia S.r.l.	Italy
Niigata Masoneilan Company Ltd.	Japan

Name	*State or Other Sovereign Under The Laws Of Which Organized*
Niigata Masoneilan Valve Service Company Limited	Japan
SDC Corporation	Japan
Swaco Geolograph Company (Partnership)	Texas
Swaco Geolograph Limited	England
Swaco Geolograph Norge A/S	Norway
TIG-Masoneilan Arabia Limited	Saudi Arabia
Worthington S.p.A.	Italy
Bakhah Kellogg Saudi Arabia Limited (Parent—M.W. Kellogg Holdings, Inc.)	Saudi Arabia
Bufete Industriale, S.A. de C.V. (Parent—Kellogg Mexico, Inc.)	Mexico
Barmex, S.A. (Parent—Baramin S.A. de C.V.)	Mexico
Dresser Cameroun S.A.R.L. (Parent—Dresser AG)	Cameroun
Dresser-Cullen Venture (Partnership)	Texas
Industrias Medina, S.A. de C.V.	Mexico
Inmobiliaria Industrial, S.A. de C.V.	Mexico
Maquiladora Industrial, S.A. de C.V. (Parent—Pleuger Worthington GmbH)	Mexico
Magcobar (Libya) Ltd. (Parent—Dresser AG Zug)	Libya
Klia S.A. (Parent—DIECL)	Brazil
Dresser Soviet Engineering	U.S.S.R.
Greaves Dresser Atlas Oilfield Ltd.	India
Hindusthan Magcobar Chemicals Ltd.	India
Inossman Fonderie Acciaio Maniago	Itay
Wortech, Inc.	Kentucky
Worthington Sytech Nigeria (Parent—Worthington S.p.A.)	Nigeria

Name	*State or Other Sovereign Under The Laws Of Which Organized*
IRI International Corporation	Delaware
Magcobar Abu Dhabi, Ltd.	Abu Dhabi
Manufacturas Petroleras Venezolanos, S.A.	Venezuela
Nile Oilfield Engineering Limited	Sudan
Petroleum and Industrial Maintenance Company Limited (Parent—Kellogg International Services Limited)	Cayman Islands
Productos Magcomex S.A. de C.V.	Mexico
Riese Consolidated Industrial C.A.	Venezuela
Shah Magcobar Chemicals Sdn. Bhd.	Brunei
Wayne (West Africa) Limited (Parent—SWOL)	Nigeria
Western Atlas International, Inc. (and subs)	Delaware
Worthington Pump India Limited (Parent—Pump Investments, Inc.)	India
MIDCO	
Bartil, Inc. (Parent—MIDCO)	North Carolina
China Nanhai-Magcobar Mud Corporation, Ltd. (Parent—MIDCO)	China
Dresco Pte. Ltd. (Parent—MIDCO)	Dubai
Dresser (Cyprus) Limited (Parent—M-I Great Britain Ltd.)	Cyprus
Drescon Produtos de Perfuracao S.A.	Brazil
Melbar Produtos de Lignina Ltda. (Partnership) (Parent—Dresser do Brasil, Ltda.)	Brazil
Global Chemicals, Inc. (Parent—MIDCO)	Cayman Islands

Name	*State or Other Sovereign Under The Laws Of Which Organized*
Kayoee Bentonite (Partnership) (Parent-MIDCO)	Wyoming
Minerals Supply, Inc. (Parent—MIDCO)	Texas
Oman Drilling Products Co. (Parent—MIDCO)	Oman
Dresser-Rand Company	
Turbodyne S.A. de C.V.	Mexico
Frontier Energy Associates, L.P.	Delaware
Martel Cogeneration Limited Partnership	Washington
Thermal Energy Development Partnership (Parent—Turbodyne Electric Power Company)	Delaware
Unicord Power Associates G.P. (Parent—TEPCO/Pembroke Power)	New Hampshire
Komatsu Dresser Company	
Komatsu Dresser Brazil S.A. (Parent—Dresser Finance Corporation)	Brazil